

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter Of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

**REPLY COMMENTS OF THE
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,
DIRECTORS GUILD OF AMERICA,
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES,
AND SCREEN ACTORS GUILD**

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The American Federation of Television and Radio Artists (“AFTRA”), Directors Guild of America (“DGA”), International Alliance of Theatrical Stage Employees (“IATSE”), and Screen Actors Guild (“SAG”) (collectively “the Guilds and Unions”) respectfully submit these reply comments on the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned dockets.

I. Introduction

Piracy is an economic cancer on the film, television, and music recording industries. Absent appropriate federal regulation, further broadband buildout and technological advances to our domestic networks will cause this cancer to metastasize. The Guilds and Unions represent over 300,000 workers who depend upon the enforcement of this country’s copyright laws to earn their living. As detailed in our initial filing, our members work in all 50 states of the union, and their continued employment results in the employment of hundreds of thousands of additional individuals throughout the country.¹ The jobs and livelihoods of these workers depend on the

¹ Comments of the American Federation of Television and Radio Artists, Directors Guild of America, International Alliance of Theatrical and Stage Employees, and Screen Actors Guild in Dockets 09-191 and 07-52 (January 14, 2010) (the “Guilds and Unions Comments”), at 1.

continued financial viability of the domestic motion picture, television, and music industries, which are currently under threat from the growth of rampant theft of copyrighted content online.

The Internet's value lies in its ability to rapidly transmit content both throughout our nation and around the world. The proliferation of high-speed Internet connections, including Broadband, is merely a means to the ends of transmitting high-bandwidth content to a greater percentage of our nation's public.² The transmission of high-bandwidth professional content, including our members' content, will be one of the biggest drivers of broadband adoption as envisioned by the Chairman. In fact, one could argue that the major driver of demand for increased broadband speeds is to facilitate the end-user's access to high-bandwidth content such as the movies, television programs, and music videos that our members create.³ The primary purpose of our filings in this proceeding is to suggest how the Commission may best ensure open access to the Internet without increasing online theft.

Our members have a unique voice in this proceeding: they make possible a substantial portion of the professional audiovisual and sound recording content that is distributed both in the United States and around the world. Our members' works are also the primary target of Internet theft worldwide. As broadband speeds increase and technologies advance, our members will be profoundly affected by the accompanying dramatic increase in the illegal distribution of their works over the Internet.

Contrary to popular misconception, our members are overwhelmingly middle-class, freelance workers who rely on downstream revenues and royalties to provide them with the

² Federal Communications Commission, Connecting America: The National Broadband Plan (March 16, 2010), at 25 (“[America] should be the leading user of broadband-enabled technologies that. . . give consumers new ways to communicate, work and entertain themselves.”)

³ See <http://www.att.com/gen/general?pid=10938> (last viewed April 8, 2010) (“Our DSL Elite plan provides downstream speeds up to 100x faster than dial-up – perfect for . . . downloading movies. . .”).

compensation and health and pension benefits that keep their families afloat.⁴ Internet theft significantly impacts both the number of jobs available to our members and the downstream revenues and royalties that enable them to earn a living and fund their benefit plans.

The Guilds and Unions are generally in favor of the Commission’s proposed rules in this proceeding as applied to lawful content, so long as the Commission encourages any parties subject to these rules to take affirmative steps to stop the distribution of content that violates federal law, including content distributed in violation of copyright. Along these lines, the Guilds and Unions propose the following:

- 1) that any non-discrimination principle⁵ not prevent or hinder the detection, monitoring, and filtering of both traffic and specific files for unlawful content; and,
- 2) that reasonable network management⁶ allow for and encourage the screening for unlawful and illegally distributed content by way of a shifting presumption of reasonable network management. Under our proposal, parties that screen for such content, including content that infringes a copyright, should be entitled to this presumption.

II. Discussion

A. The Need for Copyright Protection in the Commission’s Proposed Rules

At least one commenting party has contended that the protection of copyrighted works “should have nothing to do” with this proceeding, despite the fact that it is a “serious problem.”⁷ Others have criticized the Commission’s proposal to define reasonable network management to include reasonable practices to “prevent the transfer of unlawful content” and “prevent the

⁴ See *id.* at 8-9.

⁵ NPRM ¶ 104.

⁶ NPRM ¶ 135.

⁷ Comments of the Center for Democracy & Technology in Dockets 09-191 and 07-52 (January 14, 2010), at 42.

unlawful transfer of content.”⁸ These latter parties appear to contend that the Commission should not address copyright concerns in this proceeding for fear that addressing the well-documented and globally acknowledged problem of Internet theft “may [lead ISPs] to inflict collateral damage on lawful traffic.”⁹ We do not advocate that the Commission ignore this concern for collateral damage. Rather, we advocate that the Commission address both the serious problem of online theft of copyrighted content and the problems that may arise if service providers abuse the tools available to screen for unlawful content.

It is crucial to note that while this is primarily a proceeding to “address users’ ability to access the Internet,”¹⁰ the Commission has outlined its need “to provide greater clarity and certainty to Internet users; content, application and service providers; and broadband Internet access service providers regarding the Commission’s approach to safeguarding the open Internet.”¹¹ If the Commission seeks to provide clarity to all of these parties, it cannot and should not ignore the legality of the content that users are accessing.

The Commission is simultaneously recommending the implementation of a National Broadband Plan that would expand our information superhighway and, in the current proceedings, establishing the rules for that newly expanded highway. These rules of the road would be incomplete without also addressing the rampant trafficking of contraband audiovisual works, which has been linked to organized criminal enterprises¹², on the very Internet pipeline that the Commission seeks to expand.

⁸ Joint Comments of Computer and Communications Industry Association, et al. in Dockets 09-191 and 07-52 (January 14, 2010), at 1-2 citing NPRM Appendix A.; Comments of Google, Inc. in Dockets 09-191 and 07-52 (January 14, 2010), at 73.

⁹ Joint Comments of Computer and Communications Industry Association, et al. in Dockets 09-191 and 07-52, at 3.

¹⁰ NPRM ¶ 14.

¹¹ NPRM ¶ 50.

¹² See “Film Piracy, Organized Crime, and Terrorism,” Rand Center for Global Risk and Security (2009) at xii (“DVD piracy, which has a higher profit margin than narcotics and minimal risks of enforcement, is attractive

If the Commission, by way of this proceeding, adopts rules that are silent or equivocal regarding the need and advisability of service providers to employ technologies that detect, monitor, and filter traffic or specific files for unlawful or unlawfully distributed content, it will encourage online theft by leaving service providers unclear as to both their responsibilities and rights.

The continued unchecked growth of online theft will:

- jeopardize our members' jobs, compensation, and benefits;
- threaten America's global pre-eminence in the audiovisual entertainment and sound recording industries;
- undermine the American creativity and innovation that is, and has always been, the underpinning of the audiovisual and sound recording industries;
- interfere with the emergence of future generations of new American film and sound recording artists, technicians, and craftspeople because they will not be able to earn a living while they learn their craft;
- serve as a detriment to the public interest in both the short and long-term, as fewer movies, television shows, and albums - particularly lower budget productions that offer a diversity of perspectives and often foster the talent of young filmmakers, performers, and craftspeople - will be made; and
- pose a threat to the end-user by failing to provide safeguards against their interactions with organized crime, which is increasingly linked to film piracy.¹³

around the world as an element or criminal portfolios that also include drugs, money laundering, extortion and human smuggling... [T]his report provide[s] compelling evidence of a broad, geographically dispersed, and continuing connection between film piracy and organized crime.")

¹³ *Id.*

In short, if the Commission fails to address the theft of online content, it will be failing to provide clarity, certainty, and appropriate safeguards to Internet service providers, content providers, to the hundreds of thousands of workers who are employed in content-related industries, and to the end-user.¹⁴

B. The Proposals of the Guilds and Unions

The Guilds and Unions offer two proposals that, if enacted in tandem, would address both the need for service providers to take action with respect to unlawful and unlawfully transferred content and to the potential abuse of the technologies employed in those efforts.

i. The Commission Should Clearly Articulate that Appropriate Efforts to Screen for Unlawful Content Will Not Violate the Non-Discrimination Principle

The Guilds and Unions favor a rule whereby service providers may not discriminate in favor of or against any lawfully distributed content. At the same, any non-discrimination principle should explicitly allow for reasonable network management, including the screening¹⁵ for unlawful content and unlawfully transferred content.¹⁶ The Commission should clarify that a non-discrimination rule will not preclude or hinder service providers from screening for lawfully distributed content, including content protected by copyright.

As detailed in the NPRM, the Commission's proposed non-discrimination rules would seek to distinguish between socially beneficial and socially harmful discrimination.¹⁷ The Commission states that any non-discrimination principle would be subject to reasonable network

¹⁴ NPRM ¶ 50.

¹⁵ "Screening" refers to the deployment of technologies to detect, monitor and filter traffic or specific files based on analysis of information such as protocols, file types, text description, metadata, file size and other "external" information.

¹⁶ NPRM ¶ 103.

¹⁷ *Id.*

management¹⁸ as well as to exceptions for the needs of law enforcement, public safety, and national and homeland security authorities.¹⁹ The Guilds and Unions share the concerns of other commenters who fear that service providers may read the Commission’s current proposed non-discrimination principle as being unclear as to whether efforts to screen for unlawful content could be considered discriminatory, even absent an anti-competitive purpose.²⁰

If the Commission is unclear or equivocal on this point, service providers may cease or curtail their efforts to screen for unlawful content, including screening for spam and viruses, based on fears of litigation or other sanctions as detailed in part II.B. of our initial filing.²¹ We agree with the Institute for Policy Innovation that a cessation of screening would cause a “breakdown of our communications infrastructure.”²² We therefore urge the Commission to clarify that efforts to screen for unlawful and unlawfully transferred content, including content in violation of copyright, would not violate the non-discrimination principle absent an anti-competitive purpose.

ii. In Defining Reasonable Network Management, the Commission Should Make Clear that Screening for Unlawful Content is Reasonable, and Should Enact a Shifting Presumption of Reasonable Network Management to Prevent Abuses of Screening Technology

It is important that the Commission strengthen the language in paragraph 139 of the Notice of Proposed Rulemaking, which reads “it appears reasonable for a broadband Internet access provider (“BIAPs”) to refuse to transmit copyrighted material if the transfer of that material would violate applicable laws.” It is crucial that the Commission establish that it is presumptively reasonable for BIAPs to refuse to transmit copyrighted material that would violate

¹⁸ *Id.* ¶104.

¹⁹ *Id.* ¶105.

²⁰ See Comments of Broadcast Music, Inc. in Dockets 09-191 and 07-52 (January 14, 2010), at 1, 3-5; see Comments of Songwriters Guild of America in Dockets 09-191 and 07-52 (January 14, 2010), at 1, 6-8; *Id.* ¶ 103.

²¹ Guilds and Union Comments, at 14-16.

²² Comments of the Institute for Policy Innovation in Dockets 09-191 and 07-52 (January 14, 2010), at 5.

applicable laws; stating that this merely “appears reasonable”²³ could lead BIAPs to cease, curtail, or refuse to expand their current screening efforts. A change in language indicating the presumptive reasonableness of screening for copyright protection would make clear that BIAPs will be able to continue to manage their networks in a responsible and efficient manner.²⁴

In order to encourage BIAPs to screen for infringing content, the FCC should effectuate a shifting presumption of reasonable network management. Access providers that take affirmative steps to screen for, notify the end-user of, and block infringing content should be presumed to have acted reasonably in their network management activities. As part of this proceeding, the Commission should undertake a review to determine the minimum technological protocols that access providers would be required to enact in order to qualify for this presumption of reasonable network management. The Commission should also consider establishing an advisory committee to establish best practices for screening, notification, and blocking of infringing content, and to recommend how the minimum protocols established by way of this rulemaking should be updated as the Internet continues to develop.

If the Commission were to effect these proposals regarding the non-discrimination principle and reasonable network management, it would address both the imminent problem of online theft and the concerns regarding the abuse of tools employed to combat that theft. We strongly believe that the Commission’s proposed rules can only provide clarity and certainty regarding the safeguards of the online environment by further addressing these problems and concerns, not by ignoring them.

Finally, we would urge the Commission to adopt a flexible approach to any technical standards that are enacted in conjunction with the proposed rules. Like the recommendations of

²³ NPRM ¶139.

²⁴ See Comments of Global Intellectual Property Center, U.S. Chamber of Commerce in Dockets 09-191 and 07-52 (January 14, 2010), at 3.

the National Broadband Plan, any technical standards that accompany this proceeding should always be “in Beta,” and should be subject to adaptation along with the technical protocols that prevail on the Internet at any given time.²⁵

III. Conclusion

In order to provide clarity and certainty to content providers, service providers, and users alike, the Commission should take measures to strengthen the distinction between the lawful and unlawful distribution of content, and should enact rules that encourage service and access providers to aid in preventing the unlawful distribution of our members’ audiovisual works and sounds recordings.

Respectfully submitted,

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²⁵ National Broadband Plan, Executive Summary, available at <http://www.broadband.gov/plan/executive-summary> (last viewed April 2, 2010).